

1 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
P. CRAIG CARDON (Cal. Bar No. 168646)
2 JAY T. RAMSEY (Cal. Bar No. 273160)
BENJAMIN O. AIGBOBOH (Cal. Bar No. 268531)
3 ALYSSA SONES (Cal. Bar No. 318359)
PATRICK D. RUBALCAVA (Cal. Bar No. 335940)
4 1901 Avenue of the Stars, Suite 1600
Los Angeles, California 90067-6055
5 Telephone: 310.228.3700
Facsimile: 310.228.3701
6 Email: ccardon@sheppardmullin.com
jramsey@sheppardmullin.com
7 baigboboh@sheppardmullin.com
asones@sheppardmullin.com
8 prubalcava@sheppardmullin.com

9 *Attorneys for Defendant*
WILLIAMS-SONOMA, INC.

11
12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**

14 KAREN SPECTOR, individually and on
behalf of all others similarly situated,

15 Plaintiff,

16 v.

17 WILLIAMS-SONOMA, INC.,

18 Defendant.

Case No. 4:24-cv-06617-HSG

Assigned to the Hon. Haywood S. Gilliam, Jr.

**DEFENDANT WILLIAMS-SONOMA,
INC.'S:**

**(1) NOTICE OF RENEWED MOTION
AND RENEWED MOTION TO
DISMISS CLASS ACTION
COMPLAINT PURSUANT TO
FEDERAL RULE OF CIVIL
PROCEDURE 12(b)(6); AND**

**(2) MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF.**

*[Declaration of Patrick D. Rubalcava, Request
for Judicial Notice, and [Proposed] Order
submitted concurrently herewith]*

Hearing Date: February 6, 2025
Hearing Time: 2:00 p.m.
Courtroom: 2

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NOTICE OF RENEWED MOTION AND RENEWED MOTION

Please take notice that, on February 6, 2025, at 2:00 p.m., or as soon as thereafter may be heard in Courtroom 2 of the Northern District of California, Oakland Courthouse, located at 1301 Clay Street, Oakland, CA 94612, the Honorable Haywood S. Gilliam, Jr. presiding, Defendant Williams-Sonoma, Inc. (“WSI”) will and hereby does, pursuant to Federal Rule of Civil Procedure 12(b)(6) and Civil Local Rule 7-2, submit this Renewed Motion to Dismiss Class Action Complaint (“Motion”).¹

WSI seeks an order dismissing Plaintiff’s Karen Spector’s (“Plaintiff”) Class Action Complaint (“Complaint”) in its entirety.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case is part of a recent wave of putative class actions brought throughout the country under the Arizona Telephone, Utility, and Communication Service Records Act, Arizona Revised Statutes § 44-1376 *et seq.* (the “Arizona Records Act” or “Act”).² The Arizona Records Act was enacted to prevent “pretexting,” i.e., the fraudulent impersonation of a customer of a telephone company or public utility or subscriber to a communication service to obtain that customer’s or subscriber’s information from the company, utility, or service. These cases now seek to expand this narrow statute to prohibit—and, in fact, *criminalize*—routine commercial behavior of embedding pixels in marketing emails to measure engagement.

¹ WSI has been and is currently investigating whether Plaintiff—a member of WSI’s loyalty program—agreed to arbitrate her claim against it, which requires, *inter alia*, investigation of loyalty club processes and procedures in place several years ago. WSI brings this Motion because it is required to do in order to respond to the Complaint, but reserves its right to move to compel arbitration in the future should it confirm Plaintiff agreed to arbitrate.

² See, e.g., *Carbajal v. Home Depot U.S.A., Inc.*, Case No. 2:24-cv-00730 (D. Ariz.); *Carbajal v. Gap Inc.*, Case No. 2:24-cv-01056 (D. Ariz.); *Carbajal v. Lowe’s Home Centers, LLC*, Case No. 2:24-cv-01030 (D. Ariz.); *Knight v. Patagonia, Inc.*, Case No. 2:24-cv-09349 (C.D. Cal.); *Camp v. Sephora USA, Inc.*, Case No. 3:24-cv-07330 (N.D. Cal.); *Campos v. TJX Companies, Inc.*, Case No. 1:24-cv-11067 (D. Mass.); *Mills v. Saks.com LLC*, Case No. 1:23-cv-10638 (S.D.N.Y.); *McGee v. Nordstrom, Inc.*, Case No. 2:23-cv-01875 (W.D. Wash.).

WSI sends marketing emails to customers who sign up to receive them. WSI's emails contain a pixel (small piece of software code) that informs WSI how the email recipient engaged with the email—e.g., whether the email was opened, when, and whether the recipient clicked through a link in the email to visit WSI's website. Plaintiff alleges that WSI's use of pixels in marketing emails violates the Arizona Records Act. Until this recent wave of cases, no one had ever asserted that the Act, a statute that was enacted nearly two decades ago, applied to this standard practice of tracking a recipient's engagement with a marketing email. To date, the one court that has considered "this expansive interpretation of the statute" has rejected it. Declaration of Patrick D. Rubalcava ("Rubalcava Decl.") ¶ 9, Ex. H (*d'Hedouville v. H&M Fashion USA, Inc.*, Case No. C20243386, Order at 4 (Ariz. Super. Ct. Pima Cnty. Oct. 11, 2024) ("*d'Hedouville*"). This Court should do the same and grant WSI's Motion.

II. RELEVANT ALLEGATIONS

WSI—"one of the United States' largest ecommerce retailers' of cookware, appliances, and home furnishings"—disseminates marketing emails to drive sales. Dkt. 1, Ex. A (Complaint) ¶ 2. WSI allegedly embeds pixels within these emails "to track its recipients' reading habits" and sell and market more products. *Id.* Plaintiff alleges these pixels "capture and log sensitive information" such as when "subscribers open and read their messages" and "how long it takes it takes the subscriber to read the email" without subscribers' consent. *Id.* ¶ 4.

Plaintiff—an Arizona resident—allegedly opened and reviewed promotional emails from WSI within the past two years. Dkt. 1, Ex. A (Complaint) ¶ 7. Each time she did so, WSI allegedly "procured her sensitive email information including the time and place she opened and read the messages, how long she read the email, her location, her email client type, her IP address, her device information and whether and to whom the email was forwarded to." *Id.* ¶ 8.

Based on these allegations, Plaintiff asserts a claim for violation of the Arizona Records Act on behalf of herself and putative class of class of "[a]ll persons within Arizona who have opened a marketing email containing a tracking pixel from" WSI. Dkt. 1, Ex. A (Complaint) ¶ 46.

1 **III. ISSUES TO BE DECIDED**

2 1. Whether the Complaint should be dismissed pursuant to Federal Rule of Civil
3 Procedure 12(b)(6) for failure to state a claim for violation of the Arizona Records Act because (a)
4 it does not, and cannot, allege that WSI procured information from Plaintiff's communication
5 service providers and (b) the email-related information allegedly collected by WSI is not a
6 "communication service record" under the Act.

7 2. Whether the Complaint should be dismissed because Plaintiff lacks statutory
8 standing to pursue a claim for violation of the Arizona Records Act.³

9 **IV. LEGAL STANDARD**

10 A Federal Rule of Civil Procedure 12(b)(6) motion to dismiss tests the legal sufficiency of
11 claims asserted in a complaint. A claim should be dismissed where there is a "lack of a cognizable
12 theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v.*
13 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). A complaint must do more than allege
14 "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."
15 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint must at least allege
16 sufficient facts "to raise a right to relief above a speculative level." *Id.*; *see also Ashcroft v. Iqbal*,
17 556 U.S. 662, 678 (2009). Accordingly, "[t]o survive a motion to dismiss, a complaint must plead
18 sufficient 'factual matter, accepted as true' to 'allow[] the court to draw the reasonable inference
19 that the defendant is liable for the misconduct alleged.'" *City of Dearborn Heights Act 345 Police*
20 *& Fire Ret. Sys. v. Align Tech, Inc.*, 65 F. Supp. 3d 840, 849 (N.D. Cal. 2014) (quoting *Iqbal*, 556
21 U.S. at 678). Dismissal with prejudice is appropriate where, as here, the complaint cannot be saved
22 by amendment. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

23 **V. THE MOTION SHOULD BE GRANTED**

24 The Complaint fails to state a claim because the Arizona Records Act (1) only applies to

25 _____
26 ³ WSI previously moved to dismiss the Complaint based on, *inter alia*, a failure to allege Article
27 III standing (*see* Dkt. 11 at 8), but later withdrew the motion (*see* Dkts. 13, 14). After further
28 consideration, WSI now withdraws its Article III argument and, instead, seeks dismissal on the basis
that Plaintiff has not suffered the actual damages necessary to establish statutory standing under the
Arizona Records Act (*see* Section V.C *infra*). However, should the Court determine *sua sponte* that
Plaintiff lacks Article III standing, WSI agrees that this matter should be remanded.

1 information procured from a communication service provider, and (2) does not apply to the email-
 2 related information at issue here. Even more, Plaintiff lacks statutory standing because the
 3 Complaint does not allege she is a “customer” under the Act who has suffered actual damages.

4 **A. The Complaint Fails To State A Claim For Violation Of The Arizona Records Act**

5 ***1. Dismissal is Proper Because the Complaint Does Not Allege WSI Procured***
 6 ***Information From Plaintiff’s Communication Service Providers***

7 The Arizona Legislature enacted the Arizona Records Act to prevent “pretexting,” i.e.,
 8 impersonating a telephone company customer to obtain that customer’s telephone records from the
 9 company to then sell on the Internet. Rubalcava Decl. ¶ 3, Ex. B (AZ H.R. S. F. Sheet, 2006 Reg.
 10 Sess. H.B. 2785 (Mar. 27, 2006)) (noting “there are over 40 ‘data broker’ companies that...have
 11 fraudulently gained access to telephone records by posing as the customer” and “then offer[ed] the
 12 records for sale on the Internet without the customer’s consent or knowledge, a practice known as
 13 ‘pretexting’”). The Arizona Legislature adopted the Act to prohibit this “unauthorized sale of
 14 telephone records” and to “[d]irect[] telecommunications carriers maintaining telephone records to
 15 establish reasonable procedures to protect the consumer against such unauthorized or fraudulent
 16 disclosure.” *Id.*, ¶ 2, Ex. A (AZ H.R. B. Summ., 2006 Reg. Sess. H.B. 2785 (Feb. 16, 2006)).

17 In its original form, the Act prohibited a person from: (1) “knowingly procuring, attempting
 18 to procure, soliciting or conspiring with another to procure a telephone record ... by fraudulent,
 19 deceptive or false means”; (2) “knowingly selling or attempting to sell the telephone record ...
 20 without authorization”; and (3) “receiving a telephone record ... knowing that the record has been
 21 obtained without the authorization of the customer to whom the record pertains or by fraudulent,
 22 deceptive or false means.” Rubalcava Decl. ¶ 5, Ex. D (2006 Arizona Legis. Serv. Ch. 260 (H.B.
 23 2785)) § 44-1376.01(A)(1)–(3)). The Act defined “telephone record” as information retained by
 24 telephone companies relating to “the telephone number dialed by the customer or the incoming
 25 number of the call directed to a customer or other data related to such calls typically contained on a
 26 customer telephone bill.” *Id.* at § 44-1376(4). And a “telephone company” was defined as any
 27 person providing commercial telephone services to a customer. *Id.* Any person who violated the
 28 Act was subject to civil suit and criminal penalties. *Id.* at §§ 44-1376.04, 44.1376.05.

1 The Arizona Legislature amended the Act in 2007 to “expand” its coverage to “public
 2 utility” and “communication service” records. Rubalcava Decl. ¶ 7, Ex. F (AZ H.R. B. Summ.,
 3 2007 Reg. Sess. H.B. 2726 (Mar. 2, 2007)). As before, the intent was to combat “pretexting,” *i.e.*,
 4 “the practice of getting personal information under false pretenses.” *Id.* ¶ 6, Ex. E (AZ H.R. B.
 5 Summ., 2007 Reg. Sess. H.B. 2726 (Feb. 19, 2007)); *see also id.* ¶ 8, Ex. G (AZ S. F. Sheet, 2007
 6 Reg. Sess. H.B. 2726 (Mar. 12, 2007)). There have been no further amendments of the Act.

7 As such, the Arizona Records Act, as amended, prohibits a person from: (1) “[k]nowingly
 8 procur[ing], attempt[ing] to procure, solicit[ing] or conspir[ing] with another to procure a public
 9 utility record, a telephone record or communication service record of any [Arizona] resident ...
 10 without the authorization of the customer to whom the record pertains or by fraudulent, deceptive
 11 or false means”; (2) “[k]nowingly sell[ing] or attempt[ing] to sell a public utility record, a telephone
 12 record or communication service record of any [Arizona] resident”; and (3) “receiving a public
 13 utility record, a telephone record or communication service record of any [Arizona] resident ...
 14 knowing that the record has been obtained without the authorization of the customer to whom the
 15 record pertains or by fraudulent, deceptive or false means.” Ariz. Rev. Stat. §§ 44-1376.01(A)(1)-
 16 (3). As before, the statute subjects any violator to civil suit and criminal penalties. *Id.* §§ 44-
 17 1376.04, 44.1376.05.

18 When it amended the Act, the Arizona Legislature defined the newly-covered
 19 “communication service record[s]” and “public utility record[s].” A.R.S. §§ 44-1376(1), (4). Under
 20 the statute, a “communication service record” is:

21 subscriber information, including name, billing or installation address, length of
 22 service, payment method, telephone number, electronic account identification and
 23 associated screen names, toll bills or access logs, records of the path of an electronic
 24 communication between the point of origin and the point of delivery and the nature
 of the communications service provided, such as caller identification, automatic
 number identification, voice mail, electronic mail, paging, or other service features.

25 A.R.S. § 44-1376(1). Excluded from this definition is “the content of any stored, oral, wire or
 26 electronic communication or a telephone record.” *Id.*

27 The Act’s plain language confirms that the term “communication service record” refers to
 28 certain information of the “subscriber” to a particular “communication service”—“subscriber

1 information” only a provider of communication service would have. For example, only a
 2 communication service provider would have records of a communication service subscriber’s
 3 “billing or installation address” for the communication service, “length of [the communication]
 4 service,” and “payment method” for the communication service. By way of further example, only
 5 a communication service provider would have records of the “nature of the communication service
 6 provided” to the communication service subscriber.

7 WSI—a retailer—is a mere party to emails requested by Plaintiff. It is not a provider of any
 8 communication service; as such, information it allegedly collects *about its own emails* cannot be a
 9 “communication service record.” Rubalcava Decl. ¶ 9, Ex. H (*d’Hedouville*) at 3 (holding that
 10 information retailer collects about its own emails cannot be “communication service records” under
 11 the Act). And there is no allegation that WSI procured this email-related information from one of
 12 Plaintiff’s actual communication service providers (*e.g.*, internet service providers or wireless data
 13 carriers). *Id.* (dismissing Act claim because, *inter alia*, plaintiff did not allege retailer “procured his
 14 communication service records that were retained by [a] communication service provider”). The
 15 Act, therefore, does not and cannot apply to WSI’s alleged use of pixels in its marketing emails. *Id.*

16 The Arizona Eavesdropping and Communication Act, codified at Ariz. Rev. Stat. § 13-3001
 17 *et seq.* (“ECA”), another statute governing communication service records, confirms this
 18 conclusion. Section 13-3018 of the ECA, which was enacted in 2000, authorizes prosecutors to
 19 issue to subpoenas “to all communication service providers that do business in [Arizona] or that
 20 furnish communication services to persons within [Arizona]” to obtain “communication service
 21 records[.]” Ariz. Rev. Stat. § 13-3018(A)-(B). Its definition of “communication service records” is
 22 the same as the Arizona Records Act’s definition of “communication service record.” *Compare id.*
 23 § 13-3018(G) *with id.* § 44-1376(1). And it makes clear that “communication service records” are
 24 records held by a “communication service provider.” *Id.* § 13-3018.

25 There is no reason to believe that the Arizona Legislature imported the ECA’s definition of
 26 “communication service records” into the Arizona Records Act seven years later but intended the
 27 term as used in the Arizona Records Act to have a significantly different (and significantly broader)
 28 meaning than it does in the ECA. Indeed, to adopt the Complaint’s definition would be to

1 improperly “interpret the legislature’s use of the identical phrase in two statutes relating to the same
 2 general subject matter as having two entirely different meanings.” *Maricopa Cnty. v. Barkley*, 168
 3 Ariz. 234, 238, 812 P.2d 1052, 1056 (Ariz. Ct. App. 1990); *see also Qasimyar v. Maricopa Cnty.*,
 4 250 Ariz. 580, 587, 483 P.3d 202, 209 (Ariz. Ct. App. 2021) (“a word or phrase used in related
 5 statutes should be construed to bear the same meaning throughout”). *d’Hedouville*—the only
 6 decision of which WSI is aware that has considered a pixel claim under the Arizona Records Act—
 7 concluded this would be improper and held that the ECA’s “definition of communication service
 8 provider...should be read in harmony with the definitions in [the Act] because the statutes are of a
 9 related subject and define ‘communication service record’ with identical descriptions.” Rubalcava
 10 Decl. ¶ 9, Ex. H at 3.

11 The interpretation of “communication service record” to mean information maintained a
 12 communication service provider is the only one that makes sense in the context of the Act’s history
 13 and narrow purpose, *i.e.*, to stop “pretexters” from posing as communication service subscribers to
 14 obtain subscribers’ information from the communication service provider. WSI is not a “pretexter”
 15 using fraudulent means to obtain Plaintiff’s subscriber information from the provider of her
 16 communication service. It is a party to the communications and is allegedly collecting information
 17 about those communications. This conduct bears no resemblance to “pretexting” and, instead, is
 18 more like a party to a call keeping a record of whether the call was answered (the opening of the
 19 email) and/or whether the other party called them back (clicking on a link in the email). WSI, just
 20 like anyone sending an email using an email client with a “read receipt” feature (e.g., Microsoft
 21 Outlook), is entitled to keep a record of when a recipient opens its emails or when that recipient
 22 voluntarily communicates with it via clicking on a link. If the Arizona Legislature intended to
 23 regulate such conduct, it could have amended the Arizona Records Act in the near two decades since
 24 it was enacted to do so. It has not.

25 **2. *Even if WSI Procured the Email-Related Information From a Communication***
 26 ***Service Provider, Dismissal Would Still Be Proper Because the Information is Not***
 27 ***a “Communication Service Record”***

28 Even if the email-related information WSI allegedly collects about its own emails were the

1 subject of the Arizona Records Act, the claim would still fail because this information does not fall
 2 within the statutory definition of “communication service record.”⁴ Again, the Act defines
 3 “communication service record” as:

4 subscriber information, including name, billing or installation address, length of
 5 service, payment method, telephone number, electronic account identification and
 6 associated screen names, toll bills or access logs, records of the path of an electronic
 7 communication between the point of origin and the point of delivery and the nature
 of the communications service provided, such as caller identification, automatic
 number identification, voice mail, electronic mail, paging, or other service features.

8 A.R.S. § 44-1376(1). Notably missing from this definition is the email-related information WSI
 9 allegedly collects using pixels, *i.e.*, the “time and place subscribers open and read their messages,
 10 how long it takes the subscriber to read the email, subscribers’ location, subscribers’ email client
 11 type, subscribers’ IP address, subscribers’ device information and whether and to whom the email
 12 was forwarded to.” Dkt. 1, Ex. A (Complaint) ¶ 4. That is because the email-related information
 13 WSI allegedly collects does not qualify as a “communication service record” under the Act.
 14 Rubalcava Decl. ¶ 9, Ex. H at (*d’Hedouville*) 3–4 (dismissing Arizona Records Act claim because,
 15 *inter alia*, “the information gleaned from a tracking pixel” does not constitute a “communication
 16 service record”).

17 **B. The Complaint Should Be Dismissed Because Plaintiff Lacks Statutory Standing**

18 “A plaintiff seeking redress for a statutory violation must establish statutory standing.”
 19 *Naruto v. Slater*, 2016 WL 362231, at *2 (N.D. Cal. Jan. 28, 2016), *aff’d*, 888 F.3d 318 (9th Cir.
 20 2018) (citing *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004)). Statutory standing
 21 exists “when a particular plaintiff has been granted a right to sue by the specific statute under which
 22 he or she brings suit.” *Bush*, 386 F.3d at 1175 (internal citations and quotation marks omitted). The
 23 legislature must “make its intentions clear before [the courts] will construe a statute to confer
 24 standing on a particular plaintiff.” *Id.* Whether a plaintiff has stated a basis for statutory standing

25 _____
 26 ⁴ Any ambiguities in the Arizona Records Act must be interpreted in WSI’s favor. The Act imposes
 27 criminal penalties. A.R.S. § 44-1376.05. When a “penal statute[is] susceptible to different
 28 interpretations,” the rule of lenity requires courts to “resolve all doubts in the defendant’s favor.”
State v. Barnett, 101 P.3d 646, 649 (Ariz. Ct. App. 2004) (citation omitted); *see also Leocal v.*
Ashcroft, 543 U.S. 1, 12 n.8 (2004) (When a penal statute has “both criminal and noncriminal
 applications,” “the rule of lenity applies” to both.).

1 is tested under Federal Rule of Civil Procedure 12(b)(6). *Maya v. Centex Corp.*, 658 F.3d 1060,
2 1067 (9th Cir. 2011).

3 ***1. The Complaint Does Not Allege That Plaintiff is a “Customer” Under the Act***

4 Only a “customer whose communication service records, telephone records or public utility
5 records were procured...in violation” of the Arizona Records Act has standing to pursue a civil
6 action. Ariz. Rev. Stat. § 44-1376.04(A). Read logically, this refers to a “customer” of a
7 communication service, telephone company, or public utility whose information was procured from
8 one of these entities without authorization or through fraudulent means. Rubalcava Decl. ¶ 9, Ex.
9 H (*d’Hedouville*) at 3 (holding that Section 44-1376.04(A) of the Act “contemplates a customer, or
10 subscriber, of a communication service”); *see also* § 44-1376.01(A)(1) (prohibiting procuring
11 records “without the authorization of the customer to whom the record pertains”). The Complaint
12 does not allege that Plaintiff is a “customer” of any communication service, telephone company, or
13 public utility. And, as set forth above, the Complaint does not allege that WSI procured the email-
14 related information it allegedly collected in connection with its own communications from any of
15 those entities. Plaintiff’s Arizona Records Act claim, therefore, fails. Rubalcava Decl. ¶ 9, Ex. H
16 (*d’Hedouville*) at 3.

17 Even if “customer” were interpreted to mean the “customer” of the person allegedly
18 procuring the records in violation of the Act (which would make no sense), the Complaint would
19 still fail to state a claim because it does not allege—even in conclusory fashion—that Plaintiff is
20 WSI’s “customer.” It alleges Plaintiff received emails from WSI. But WSI’s products are not
21 emails; they are “cookware, appliances, and home furnishings.” Dkt. 1, Ex. A (Complaint) ¶ 2. And
22 the Complaint does not allege Plaintiff ever purchased any items from WSI. Rubalcava Decl. ¶ 9,
23 Ex. H (*d’Hedouville*) at 3 (“Plaintiff has not alleged that he is a customer of H&M because he does
24 not claim that he has purchased any item from H&M. Even if he had, it would not change the
25 outcome because the act contemplates a customer, or subscriber, of a communication service”). As
26 such, Plaintiff lacks standing to pursue a claim under the Act and the Complaint should be dismissed.

27 ***2. The Complaint Does Not Allege Plaintiff Suffered Actual Damages***

28 Plaintiff also lacks statutory standing under the Arizona Records Act because she does not

1 state a claim involving actual damages.

2 The Arizona Records Act provides that a “customer” whose records were procured in
3 violation of the statute may bring a civil action to recover “[d]amages equal to the sum of the actual
4 damages suffered by the plaintiff and any profits made by the violator as a result of the violation but
5 in no case shall a person entitled to recover receive less than one thousand dollars.” A.R.S. § 44-
6 1376.04(A)(2). The statutory language does not suggest that the referenced one thousand dollars is
7 a penalty or a liquidated damages amount, as the language is expressly tied to a “customer’s” harm.
8 *See id.*; compare *Black’s Law Dictionary* 1154 (7th ed. 1999) (defining “statutory penalty” as one
9 “imposed for a statutory violation; esp., a penalty imposing automatic liability on a wrongdoer for
10 violation of a statute’s terms without reference to any actual damages suffered”).⁵ To have standing,
11 therefore, a plaintiff must have suffered actual damages.⁶

12 Even if the statutory language were ambiguous, the legislative history proves that the
13 legislature intended to require actual damages to bring suit. *See Florida Power & Light Co. v.*
14 *Lorion*, 470 U.S. 729, 737 (1985); *In re Del Biaggio*, 834 F.3d 1003, 1010 (9th Cir. 2016); *State v.*
15 *Chandler*, 244 Ariz. 336, 338 (Ariz. Ct. App. 2017). The Arizona State Senate Fact Sheet for House
16 Bill 2875 (which would later become the Arizona Records Act) stated that the purpose of the act
17 was to “[p]rohibit[] the procurement and sale of telephone records through unauthorized, fraudulent
18 or deceptive means.” Rubalcava Decl. ¶ 4, Ex. C (AZ S. F. Sheet, 2006 Reg. Sess. H.B. 2785 (Apr.

19
20 ⁵ Unlike other statutes, the text does not refer to this \$1,000 figure as any type of “penalty,”
21 “liquidated damages,” or provide \$1,000 as an alternative to an actual damages recovery. *See, e.g.*,
22 Cal. Lab. Code § 226(e) (referring to violation as a “penalty”); Cal. Civ. Code § 1794(c) (same); 18
23 U.S.C. § 2710 (“The court may award ... actual damages but not less than *liquidated damages* in an
amount of \$2,500”) (emphasis added); 15 U.S.C. § 1681n(a)(1)(B) (calling for recovery of “actual
damages sustained by the consumer as a result [of a violation] *or* \$1,000, whichever is greater”) (emphasis added).

24 ⁶ This is the only interpretation that makes sense, as a contrary interpretation would mean that a
25 plaintiff who suffered no actual damages would have a claim that is not cognizable in Arizona courts
26 (*see* Rubalcava Decl. ¶ 9, Ex. H (*d’Hedouville*) at 5) but that was permissible elsewhere. Allowing
27 that plaintiff to bring her claims elsewhere would be to permit the plaintiff to pursue a claim in any
28 court *except for* Arizona courts. The Arizona Legislature did not intend to pass a statute wherein a
subset of claims could only be pursued outside of the State; the Act was enacted with the express
purpose of protecting Arizona residents. *See Ma v. Ashcroft*, 361 F.3d 553, 558 (9th Cir. 2004)
(courts should avoid interpretations that “would produce absurd results”) (citation omitted).

25, 2006)). As to a potential remedy for a violation, the Senate Fact Sheet also stated the Act would:

Allow[] a person whose telephone records were procured, sold or received in violation of the telephone record requirements to recover from the person that committed the violation, in a civil action, the following:

...

b) damages equal to the sum of the actual damages suffered by the person and any profits made by the violator as a result of the violation. ***Damages must be at least \$1,000.***

Id. at 2 (emphasis added). The legislative history makes clear, therefore, that the Act was intended to provide a civil remedy to only individuals who have suffered damages.

Plaintiff's claim arises out of WSI's alleged use of pixels that identify when emails were opened and read. Yet, the Complaint is devoid of any allegation that Plaintiff has suffered actual damages. *See generally* Dkt. 1, Ex. A (Complaint). At most, the Complaint concludes that WSI "invaded" Plaintiff's "right to privacy by its invasive surveillance of [her] sensitive reading habits," which allegedly "also intruded upon [her] seclusion." *Id.* ¶ 63. But the Complaint does not allege that Plaintiff suffered any actual damages as a result of the alleged invasion of privacy. As such, Plaintiff does not have statutory standing to pursue a civil claim under the Arizona Records Act.

VI. CONCLUSION

For the foregoing reasons, WSI respectfully requests the Court grant this Motion and dismiss the Complaint with prejudice.

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

Dated: December 4, 2024

By

/s/ P. Craig Cardon

P. CRAIG CARDON

Attorneys for Defendant
WILLIAMS-SONOMA, INC.

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